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No. 93-762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,

Petitioner,

v.

GREAT LAKES DREDGE & DOCK COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

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The Supreme Court in *Sisson v. Ruby*, 497 U.S. 358 (1990), did not establish a rule of law for invoking admiralty jurisdiction for every circumstance. It explicitly reserved ruling on how its test might need to be refined if faced with the situation where the relevant parties were not engaged in "similar types of activity." 497 U.S. at 365-366 nn.3, 4.[1] That situation is now squarely before the Court.

[1] Respondent twice misquotes *Sisson* by stating that the three-pronged test "provides appropriate and sufficient guidance to the federal courts." Response at 9, 14, *quoting* 497 U.S. at 366 n.4. Respondent cut off the qualifier language at the beginning of the quote. What the *Sisson* Court actually said is that its test provided sufficient guidance, "at least in cases in which all of the relevant entities are engaged in similar types of activity. . . ." *Id.*

This case was decided by the Seventh Circuit under a particular rule. The same facts would have been decided in the Fifth Circuit or the Ninth Circuit under a different rule, and with a different result, just as it was by the district court. There is, therefore, a conflict of applicable rules of law between or among the Circuits. It cannot matter for this Court's purposes whether the Seventh Circuit acknowledges the existence of the conflict, as Respondent suggests.

The Court of Appeals employed a "rigidly structured" analysis of the three questions comprising the *Sisson* test in deciding that admiralty jurisdiction applied. *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 228 (7th Cir. 1993). Policy considerations were ignored along with any other factors not deemed relevant to answering the three questions posed in *Sisson*. 3 F.3d at 228-229. In contrast, the district court, following the approach of other Circuits, looked to the entire *Sisson* opinion and the evolution of the Court's test to analyze the jurisdiction issue. It applied a totality of the circumstances approach within the context of the *Sisson* principles in determining that the non-maritime factors and concerns far outweighed the few maritime attributes.

By limiting itself to asking only three questions, the Seventh Circuit ignored the role and functions of the thousands of injured parties in this matter. At best, only the Respondent was engaged in a maritime activity; none of the injured parties were. The differing activities of the parties, as *Sisson* recognized, creates a circumstance not present in *Sisson*, or in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), and *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972). 497 U.S. at 365 n.3. The *Sisson* Court left open the question whether its three-pronged test would suffice in this situation, and

suggested that further refinement of the test would be necessary. 497 U.S. at 365-366 nn.3, 4. Moreover, the Court *never* suggested that the three-pronged test should be mechanically applied or that the substantial policy interests underlying its development should be ignored.

The Seventh Circuit confronted the jurisdictional inquiry as if the situation before it was the same as in *Sisson*, *Foremost*, and *Executive Jet*. The circumstances of the parties here are materially different and the Seventh Circuit's failure to recognize the significance of this dissimilarity caused it to deem irrelevant facts and factors that could not be pigeonholed into the three-pronged test. By refusing to look beyond the three questions, the Court of Appeals decreed that no refinement of the *Sisson* test is necessary or possible, regardless of the different activities of the parties or the existence of the many other factors militating against the application of admiralty jurisdiction.

In an effort to soften the Seventh Circuit's extremist position, Respondent contends that the Court of Appeals considered the substance of the *Kelly* elements (*Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973)), even if it did not specifically identify them. *See* Response at 14. Not only did the Seventh Circuit clearly and unequivocally state to the contrary, but even Respondent does not seem to believe it. One of the four *Kelly* factors is the function and role of the parties. Yet, Respondent concedes that the Court of Appeals "gave no weight" to the activities of Grubart and the other plaintiffs. Response at 15. As previously mentioned, the Seventh Circuit also excluded a policy analysis from its examination, another factor required by *Kelly* and every other Circuit which has interpreted *Sisson*. *See, e.g., Sinclair v. Soniform, Inc.*, 935 F.2d 599 (3d Cir. 1991); *Price v. Price*, 929 F.2d 131 (4th

Cir. 1991); *Palmer v. Fayard Moving and Transp. Corp.*, 930 F.2d 437 (5th Cir. 1991); *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993); *Penton v. Pompano Construction Co., Inc.*, 976 F.2d 636 (11th Cir. 1992); *see also, Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625 (D.C. Cir. 1991). The Seventh Circuit's statements and reasoning cannot be rehabilitated by Respondent's revisionist explanations.

Respondent argues in the alternative that consideration of the *Kelly* factors is "not always" required after *Sisson*. Response at 13. Thus, for the first time, Respondent aligns itself with Petitioner and the district court as to the limited breadth of the three-pronged *Sisson* test when not all of the instrumentalities or relevant entities are engaged in similar types of activity. *See* 497 U.S. at 365-366 nn.3, 4. Standing alone in the other corner is the Seventh Circuit, unable or unwilling to acknowledge that a "totality of the circumstances" approach is ever appropriate or necessary after *Sisson*. The Seventh Circuit stoically resists looking beyond the three *Sisson* questions and simply dismisses the relevance of other troubling factors in the jurisdictional inquiry or bootstraps the analysis with the Admiralty Extension Act, 46 U.S.C. § 740 (1988). This nihilism runs directly counter to this Court's admonition that the different activities of the parties may require additional refinement of its test.

Rarely is any judicial pronouncement or tenet cast in stone or framed to cover every situation. The Seventh Circuit has, in effect, declared that the *Sisson* three-pronged test fits the bill in every case, regardless of the circumstances. Its reasoning has produced the same injustices and anomalies as the old strict locality test which *Executive Jet*, *Foremost*, and *Sisson* sought to redress. Progress is not gained by latching on to a new set of tidy rules.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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